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First report on State responsibility by Mr. James Crawford, Special Rapporteur

Addendum

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3. Summary of recommendations in relation to Chapter II

287. For the reasons given, the Special Rapporteur proposes the following articles in Chapter II of Part One. The notes appended to each article explain very briefly the changes that are proposed. They are merely for the purposes of explanation at this stage and are not intended to substitute for the formal commentary.

Chapter II

Attribution of conduct to the State under international law

Article 5

Attribution to the State of the conduct of its organs

For the purposes of the present articles, the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises constituent, legislative, executive, judicial or any other functions, and whatever the position that it holds in the organization of the State.

Notes:

1. Article 5 combines into a single article the substance of former articles 5, 6 and 7 (1). The reference to a "State organ" includes an organ of any territorial governmental entity within the State, on the same basis as the central governmental organs of that State: this is made clear by the final phrase, "whatever the position that it holds in the organization of the State".

2. Chapter II deals with attribution for the purposes of the law of State responsibility, hence the phrase "For the purposes of the present articles" in article 5.

3. The requirement that an organ should have "that status under the internal law of that State" is deleted, for the reasons explained in paragraph 167 above. The status and powers that a body has under the law of the State in question are obviously relevant in determining whether that body is an "organ" of the State. But a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law.

4. The requirement that the organ in question should have acted in its capacity as such is retained, but it is no longer formulated as a proviso, thereby avoiding any inference that the claimant has any special burden of showing that the act of a State organ was not carried out in a private capacity.

5. The words "whether the organ exercises constituent, legislative, executive, judicial or any other functions" are words of extension and not limitation. Any conduct of a State organ, in its capacity as such, is attributable to the State, irrespective of the classification of the function performed or power exercised. In particular, no distinction is drawn for the purposes of attribution in the law of State responsibility between acta iure imperii *and* acta iure gestionis. *It is sufficient that the conduct is that of an organ of the State acting in that capacity.*

6. The phrase "whether it holds a superior or a subordinate position" might imply that organs which are independent and which cannot be classified as either "superior" or

"subordinate" are excluded, whereas the intention is to cover all organs whatever their position within the State. The language proposed in article 5 is intended to make that clear.

~~**Article 6**~~

~~**Irrelevance of the position of the organ in the organization of the State**~~

***Note**: Article 6 as adopted on first reading was not a rule of attribution but rather an explanation as to the content and effect of article 5. It is convenient and economical to include the qualification in article 5 itself, with minor drafting amendments. On that basis, article 6 can be deleted without any loss of content to Chapter II as a whole.*

Article 7

Attribution to the State of the conduct of separate entities empowered to exercise elements of the governmental authority

The conduct of an entity which is not part of the formal structure of the State but which is empowered by the law of that State to exercise elements of the governmental authority shall also be considered as an act of the State under international law, provided the entity was acting in that capacity in the case in question.

***Notes**:*

1. Article 7, paragraph 1, as adopted on first reading, dealt with bodies which should be considered as part of the State in the general sense. As explained in paragraph 191 above, for the purposes of State responsibility, all governmental entities which constitute "organs" are treated as part of the State, and this was made clear by the general language of what was article 6 and is now proposed as part of article 5. Paragraph 1 is accordingly deleted.

2. The remaining paragraph (formerly paragraph 2) deals with the important problem of "parastatals" or "separate entities", which are not part of the formal structure of the State in the sense of article 5 but which exercise elements of the governmental authority of that State.

3. In contrast to State organs in the sense of article 5, the normal situation will be that these "separate entities" do not act on behalf of the State; but if they are empowered to exercise elements of governmental authority, their conduct may, nonetheless, be attributed to the State. It is appropriate to make the distinction between the two cases by retaining the proviso in article 7 ("provided the entity was acting in that capacity in the case in question").

4. The reference to internal law was deleted from article 5 for reasons explained above, and there is a case for doing the same in relation to article 7. On balance, however, the reference to internal law has been maintained. By definition, these entities are not part of the formal structure of the State, but they exercise governmental authority in some respect; the usual and obvious basis for that exercise will be a delegation or authorization by or under the law of the State. The position of separate entities acting in fact on behalf of the State is sufficiently covered by article 8.

5. The earlier reference to "an organ of an entity" has been deleted, on the ground that the entities are very diverse and may not have identifiable "organs". It is sufficient

that the conduct is properly regarded as that of the entity in question, but it is impossible to identify in advance when this will be the case.

Article 8

Attribution to the State of conduct in fact carried out on its instructions or under its direction and control

The conduct of a person or group of persons shall also be considered as an act of the State under international law if:

(a) The person or group of persons was in fact acting on the instructions of, or under the direction and control of, that State in carrying out the conduct; or

(b) The person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which called for the exercise of those elements of authority.

Notes:

1. Article 8 (a) deals with the case of conduct carried out for a State by someone in fact acting on its behalf, for example by virtue of a specific authorization or mandate. The reference to a "person or group of persons" is not limited to natural persons but includes other entities. It does not matter whether or not a group or entity has separate legal personality for this purpose.

2. In addition (and for the reasons given in paragraphs 215-216 above), article 8 (a) should cover the situation where a person, group or entity is acting under the direction and control of a State in carrying out particular conduct. In short, article 8 (a) should cover cases of agency and cases of direction and control; in both cases, the person who carries out the conduct is acting in fact on behalf of the State. On the other hand, the power or potential of a State to control certain activity (for example, the power inherent in territorial sovereignty, or in the ownership of a corporation) is not of itself sufficient. For the purposes of attribution, the control must actually be exercised so as to produce the desired conduct. This is intended to be conveyed by the requirement that the person should be acting "under the direction and control of the State in carrying out the particular conduct".

3. Paragraph (b) deals with the special case of entities performing governmental functions on the territory of a State in circumstances of governmental collapse or vacuum. It is retained from the text as adopted on first reading, subject only to minor drafting amendments. The most significant of these is the substitution of the phrase "called for" instead of "justified"; as to which, see paragraphs 220-221 above.

Article 9

Attribution to the State of the conduct of organs placed at its disposal by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it had been placed.

Notes:

1. Article 9 as adopted on first reading dealt both with organs of other States and of international organizations placed at the disposal of a State. For the reasons given in paragraph 234 above, the reference to international organizations has been deleted. Article 9 is, however, retained in its application to organs of States, subject to minor drafting amendments.

2. The situation covered by article 9 is to be distinguished from cases where another State acts on the territory of a State but for its own purposes, with or without the consent of the territorial State. In such cases, the organ in question is not "placed at the disposal" of the territorial State and, unless there is some other basis for attribution, the territorial State is not responsible for its conduct. This "rule of non-attribution" was previously covered by article 12, but for the reasons given in paragraphs 254-255, it is recommended that that article be deleted. The commentary to article 12 should be incorporated in the revised commentary to article 9.

Article 10

Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

The conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, such organ or entity having acted in that capacity, shall be considered an act of the State under international law even if, in the particular case, the organ or entity exceeded its authority or contravened instructions concerning its exercise.

Notes:

1. This important principle is retained with minor amendments from the text adopted on first reading. See paragraphs 238-243 above.

2. The minor amendments are as follows: first, the reference to "territorial governmental entities" is deleted, consequential upon the deletion of article 7 (1). Territorial governmental entities within a State are subsumed as organs of the State in article 5. Secondly, the term "authority" is preferred to the previous term "competence according to internal law" (see paragraph 243 above). In addition, the words "or entity" need to be inserted in the first sentence for the sake of completeness, and in the second sentence it is more elegant to refer to the "exercise" of authority than to an "activity".

~~Article 11~~

~~Conduct of persons not acting on behalf of the State~~

Note: For the reasons given in paragraphs 244-248 above, it is recommended that article 11 be deleted. However, the substantial point which it seeks to make is covered by the proposed new article 15 bis, *to which the commentary to article 11 can be attached.*

~~**Article 12**~~

~~**Conduct of organs of another State**~~

***Note**: For the reasons given in paragraphs 249-255 above, it is recommended that article 12 be deleted. Aspects of the commentary to article 12 can be included in the commentary to article 9.*

~~**Article 13**~~

~~**Conduct of organs of an international organization**~~

***Note**: For the reasons given in paragraphs 256-262 above, it is recommended that article 13 be deleted. Instead, there should be a savings clause referring to international responsibility of or for international organizations.[201] Elements of the commentary to article 12 can be included in the commentary to that savings clause.*

~~**Article 14**~~

~~**Conduct of organs of an insurrectional movement**~~

***Note**: For the reasons given in paragraphs 275-276 above, it is recommended that article 14 be deleted. The substance of paragraph 1 and of the commentary to article 14 can be included in the commentary to article 15.*

Article 15

Conduct of organs of an insurrectional movement

1. The conduct of an organ of an insurrectional movement, established in opposition to a State or to its government, shall not be considered an act of that State under international law unless:

(a) The insurrectional movement succeeds in becoming the new Government of that State; or

(b) The conduct is otherwise considered to be an act of that State under articles 5, 7, 8, 9 or 15 *bis*.

[201] Such a savings clause might read as follows:

Article A

Responsibility of or for the conduct of an international organization

These draft articles shall not prejudge any question that may arise in regard to the responsibility under international law of an international organization or of any State for the conduct of an international organization.

2. The conduct of an organ of an insurrectional movement whose action results in the formation of a new State shall be considered an act of the new State under international law.

Notes:

1. For the reasons given in paragraphs 279-280 above, it is desirable to retain an article dealing with the conduct of insurrectional movements to the extent (but only to the extent) that such conduct may give rise to the responsibility of a State. Article 15 maintains the substance of article 15 as adopted on first reading.

2. Consistently with the scope of the Draft articles as a whole, article 15 does not deal with any issue of the responsibility of entities which are not States, nor does it take any position on whether or to what extent "insurrectional movements" may be internationally responsible for their own conduct, or may in other respects have international legal personality.

3. Nor does article 15 define the point at which an opposition group within a State qualifies as an "insurrectional movement" for these purposes: this is a matter which can only be determined on the basis of the facts in each case, in the light of the authorities cited in the commentary. However, a distinction must be drawn between the more or less uncoordinated conduct of the supporters of such a movement and conduct which for whatever reason is attributable to an "organ" of that movement. Thus, the language of article 15 has been changed to refer to "the conduct of an organ of an insurrectional movement".

4. Paragraph 1 is proposed in negative form to meet concerns expressed about the attribution to the State of unsuccessful insurrectional movements. Unless otherwise attributable to the State under other provisions of Chapter II, the acts of such unsuccessful movements are not attributable to the State.

Article 15 *bis*

Conduct of persons not acting on behalf of the State which is subsequently adopted or acknowledged by that State

Conduct which is not attributable to a State under articles 5, 7, 8, 9 or 15 shall be considered an act of that State if and to the extent that the State subsequently acknowledges or adopts that conduct as its own.

Notes:

1. This is a new provision, which is proposed for the reasons given in paragraphs 281-286.

2. The phrase "if and to the extent that" is intended to convey the idea: (a) that the conduct of, in particular, private persons, groups or entities is not attributable to the State unless it is under some other article of Chapter II, or unless it has been adopted or acknowledged; (b) that a State might acknowledge responsibility for conduct only to a certain extent; and (c) that the act of adoption or acknowledgement, whether it takes the form of words or conduct, must be clear and unequivocal. The phrase "adopts or acknowledges that conduct as its own" is intended to distinguish cases of adoption from cases of mere support or endorsement by third parties. The question of aid or assistance by third States to internationally wrongful conduct is dealt with in Chapter IV of Part One.